Due service of the within Brief is hereby acknowledge this.....day of April, A. D. 1931.

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Attorneys for Appellants.

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CHARLES ELMORE CRO
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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1930.

No.... 43

Bandini Petroleum Company, a corporation; Commodore Petroleum Company, a corporation; Wilshire Oil Company, Inc., a corporation; Wilshire Annex Oil Company, a corporation; and Ambassador Petroleum Company, a corporation,

Appellants.

vs.

The Superior Court of the State of California, in and for the County of Los Angeles, and Honorable William Hazlett, as one of the judges thereof,

Appellees.

BRIEF OF APPELLEES ON MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT BELOW.

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IN THE

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Bandini Petroleum Company, a corporation, et al.,

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The Superior Court of the State of California, in and for the County of Los Angeles, and Honorable William Hazlett, as one of the judges thereof,

Appellees.

BRIEF OF APPELLEES ON MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT BELOW.

I.

The California Oil and Gas Conservation Act of 1929 and the Opinions of the Courts of Last Resort of That State Construing the Act.

The appeal to this court challenges the validity under the Constitution of Section 8b of the California Oil and Gas Conservation Act of 1929, reading as follows:

> "The unreasonable waste of natural gas by the act, omission, sufferance or insistence of the lessor, lessee or operator of any land containing oil or gas, or both, whether before or after the removal of gasoline from such natural gas, is hereby declared to be opposed to the public interest and is hereby prohibited and declared to be unlawful. The blowing, release or escape of natural gas into the air shall be *prima facie* evidence of unreasonable waste."

The act (Sec. 14b) secured appellants a hearing in a court of equity having general jurisdiction.

All of the sections of the Act mentioned in appellants' petition for appeal to this court [R. p. 672], together with other sections of the Act considered pertinent by appellees are set out as Appendix A in the printed Supplement to this brief at page 3.

The opinion of the District Court of Appeal of California, of date November 29, 1930, stating the facts of the case and the reasons for the order appealed from to this court has not been officially reported. The opinion is unofficially reported in 63 Cal. App. Dec. 1175, pamphlet edition of December 10, 1930. A copy of the opinion is brought to this court [R. p. 333], appearing a second time in the record [R. pp. 643 to 671].

The Supreme Court of California denied a writ of supersedeas directed to the same preliminary injunction sought to be reviewed here on this appeal. The opinion has not been officially reported, but may be found under the title *People v. Associated Oil Co., et al.*, L. A. No. 12311, decided in bank December 3, 1930. A copy of this opinion is printed in Supplement to this brief, page 19, as Appendix B. The opinion is unofficially

reported in 80 Cal. Dec. 607, pamphlet edition of December 9, 1930.

The preliminary injunction in this case was appealed to the Supreme Court of California by defendants other than the appellants here, and there sustained. Opinion filed March 26, 1931, and not officially reported. A copy of this opinion is printed in Supplement to this brief at page 45 as Appendix C.

The Supreme Court of California there said:

> "We reiterate that the legislation in question has lawfully vested in the Superior Court the power to determine what wastage of gas in the production of oil is reasonable or unreasonable. *Whether such wastage is reasonable or unreasonable is a question of fact* and should be determined in view of the necessity of one landowner to make productive use of his parcel, in view of the equal right of the adjoining owners not to be deprived of correlative production from their parcels, and in view of the right of the public to prevent the waste of that which cannot be replaced." [*People v. Associated Oil Co., et al.*, decided March 26, 1931, App. "C." Supp. p. 50.]

II.

Judicial Notice Taken of the Physical and Economic Laws Governing Oil and Gas. Appendices to Refresh Judicial Knowledge.

The Supreme Court of California took judicial notice of the condition and development of the petroleum industry and the physical and economic laws governing oil and gas production, and refreshed its judicial knowledge by an examination of scientific works and encyclopedic

articles [*People v. Associated Oil Co., et al.*, on supersedeas, Supp. p. 33]. The rule is the same in this court (*Schollenberger v. Pennsylvania*, 171 U. S. 1, 9).

Judicial knowledge will also be taken of current events, and from this source the court will know the conditions in the oil and gas industries at the time of the enactment of the Oil and Gas Conservation Act (*Liberty Warehouse Co. v. Burley T. G. Co-Op. M. Assn.*, 276 U. S. 71, 93).

For the convenience of the court there appears in the Supplement to this brief the following:

APPENDIX D—Quotations from Report IV of the Federal Oil Conservation Board;

APPENDIX E—Quotation from Report III of the Federal Oil Conservation Board;

APPENDIX F—Reprint of Table from Article Entitled "GAS, *Natural*" New International Year Book 1929, p. 320;

APPENDIX G—Quotation from article entitled "GAS, *Natural*", Americana, Vol. 12, p. 302, Edition of 1927;

APPENDIX H—Copy of "NATURAL GAS IN 1927", Department of Commerce, Bureau of Mines Report.

III.

Statement of Case.

The District Court of Appeal of California, in its opinion on the order appealed from, said:

> "This is an original prohibition proceeding. The petitioners seek to prevent the respondent court from enforcing a preliminary injunction and order modifying the same and also to check any further order or proceeding against them in an action pending in the

respondent court entitled People of the State of California on relation of Fred G. Stevenot, Director of Natural Resources of the State of California v. Associated Oil Company, *et al.*, which action was brought for the purpose of enjoining all of the defendants therein named from unreasonably wasting natural gas from their wells in the Santa Fe Springs oil field. On March 19, 1930, after hearing the parties to the action, the court granted a temporary injunction limiting and defining the amount of gas which the defendants would be allowed to permit to escape into the air from their wells in the field mentioned. On March 28, 1930, the court made another order somewhat relaxing the terms of the injunction *pendente lite*. It is asserted by petitioners that they have been irreparably injured and damaged by attempting to curtail the production of natural gas; that there is no market for a large part thereof and that if they are to be allowed as they claim it is their right, to employ the gas as a lifting power to raise the oil from below the surface they must of necessity permit a portion thereof to escape into the air; that prior to the temporary injunction they were producing 19,554 barrels of oil per day but that operating most efficiently under the amount of gas allowed to be used by the modified order they cannot possibly produce more than 10,211 barrels per day." [R. pp. 333-334.]

The preliminary injunction of the appellee Superior Court recited:

"The Court having read the verified complaint and the affidavits in support of the relief prayed for in said complaint, and having read the verified answers of defendants on file herein and the affidavits filed on behalf of certain defendants, and having taken testimony, both oral and documentary, in open court and having heard the attorney for plaintiffs and the attorneys for the defendants appearing herein, the Court finds that no sufficient cause has been shown why a preliminary injunction should not be

issued as prayed for in said complaint, and as hereinafter provided, and the Court having considered the law and the premises *finds* that there appears to be an unreasonable waste of natural gas in the Santa Fe Springs Oil Field; that to preserve the subject matter of the action to abide the decree of the Court at the conclusion of the trial a preliminary injunction is necessary at this time; that the evidence available to the Court at this time shows that the unreasonable waste of natural gas in said field may be substantially reduced and that the equities of all parties may be fairly conserved by a preliminary injunction which will limit the waste of gas by restricting the production thereof to a quantity reasonably in excess of the present outlets for beneficial use above ground, require the extraction of gasoline from the gas produced in the field; that accordingly for the purposes of this order, the total gas outlets for all uses with a reasonable tolerance to take care of fluctuating demands and the necessary waste is taken at approximately two hundred eighty-five million (285,000,000) cubic feet of gas each day, and the estimated potential production oil is taken at two hundred thirty-seven thousand ~~four~~ five hundred ~~twenty-two~~ seventy-six (~~237,422~~) (237,576) (W. H.) barrels each day distributed among leases and other operating property units as shown in the schedule hereafter set out; and that sufficient cause has been shown for the extraordinary relief of a preliminary injunction pending the trial of the action on the merits, and the entry of a final judgment herein." [R. pp. 295-296.]

It was then provided that the defendants be enjoined until the further order of the court:

"1. From blowing, releasing or permitting any natural gas to escape into the air from any well or wells in the Santa Fe Springs Oil Field before the removal of the gasoline from such natural gas.

"2. From operating any well producing natural gas in the Santa Fe Springs Oil Field except while

exercising a high degree of care in the selection and adjustment of appliances and in the use thereof for the purpose of keeping each producing well in its 'optimum gas-oil ratio'—the term 'optimum gas-oil ratio' being defined as the smallest number of cubic feet of gas which can be produced with each barrel of oil from the same well at the same time.

"3. From producing more net formation gas on the average day of each seven (7) day period from any lease or other property unit than is set forth in the 'Allowed Gas Production' column in the schedule following:" [R. p. 297.]

The name of each operator of an oil well, the designation of each leasehold or other operating property on which it is situated is then set out, and opposite thereto the estimated potential in barrels of oil per day and the allowed gas production in daily average thousands of cubic feet as to each property. [R. pp. 298 *et seq.*]

The appellants were at all times wasting to the air in excess of 26,000,000 cubic feet of gas each average day [aggregate of items, Schedule Exhibit to Complaint following R. p. 57]. This waste to the air by appellants was from fifty to sixty per cent of their total gas production. The cut in gas production required by the order resulted in a cut of approximately fifty per cent in oil production, which was the general average throughout the field.

These findings of fact are matters of state law, and the findings of the appellee Superior Court being satisfactory under its procedure to the California court of last resort are conclusive here (*Mt. St. Mary's Cemetery Assn. v. Mullins*, 248 U. S. 501, 503; *Pierce Oil Corp. v. Hope*, 248 U. S. 498).

By judicial knowledge the appellee Superior Court knew, and this Court knows: That the total consumption of natural gas in the United States (including residue gas from natural gasoline plants) by industrial users in 1927 amounted to 1,149,208,000,000 cubic feet, an increase of 1926 of 12 per cent, of which 212,364,000,000 cubic feet was produced and delivered to consumers in California. That there were 745,740 domestic consumers of natural gas in California in that year [Appendix H, Supp. p. 90, "Natural Gas in 1927" Bureau of Mines Report]. The following year (1928), in number of domestic consumers of natural gas, California was *second,* being surpassed only by Ohio; in the consumption of natural gas and field drilling and operating plants California was *second,* being exceeded only by Oklahoma; in the use of natural gas for fuel at petroleum refineries California was *third,* being exceeded by Texas and Louisiana; and in the use of natural gas for all industries other than carbon black California was *third,* being exceeded only by Texas and Pennsylvania [Appendix F, Supp. p. 81, New International Year Book, 1929].

The quotation from Report III of the Federal Oil Conservation Board shows that the California Oil and Gas Conservation Act of 1929 was adopted pursuant to careful investigation of what was required to regulate the industry conducted by a committee of nine appointed by the Federal Oil Conservation Board [Supp. p. 67].

On the hearing before the appellee Superior Court there was satisfactory evidence that during the year 1928 over 77,000,000,000 cubic feet of natural gas were wasted into the air from the sub-surface oil and gas zones in the state

of California derived from the operation of oil wells [Affidavit of Brown, R. p. 91; Supp. p. 20].

The natural gas so wasted to the air had the energy equivalent of 3,850,000 tons of good coal, 20,000 cubic feet of natural gas being the equivalent of a ton of good coal [Supp. pp. 84-85, Appendix G].

There was a large use of natural gas, and many domestic consumers, industrial plants, and public buildings within the vicinity of Santa Fe Springs Oil Field depended upon a continuous supply of natural gas for heat and power and the use was being extended [Affidavit of Brown, R. p. 92].

Because of the increase in the production of oil since that time a proportional increase in the wastage of natural gas was taking place, so that in the Santa Fe Springs Oil Field alone there was at the time of the commencement of the action in appellee Superior Court a wastage of natural gas to the extent of approximately 500,000,000 cubic feet of gas *per day* [Complaint, Exhibit AA, following R. p. 57]. See opinion Supreme Court of California to this point [Supp. p. 20]. This was a waste of energy equivalent to 25,000 tons of coal a day.

The opening of a well into any oil and gas zone disturbs the pressure of the gas in all parts of the zone, and the withdrawal of gas reduces the gas pressure throughout the whole of the zone so that where two wells produce from the same zone if one produces a barrel of oil with 500 cubic feet of gas and the other a barrel of oil with 1,000 cubic feet of gas, the first well is much more efficient than the second well [Affidavit of Gaylord, R. p. 81].

In their opinions in the case sustaining the orders of appellee court the District Court of Appeal of California and the Supreme Court of California each said that in determining the nature of the landowner's interest and

right to perfect title to oil and gas in the strata beneath the ground through wells drilled from the surface they were following the opinions of this court in *Ohio Oil Co. v. Indiana*, 177 U. S. 190; *Walls v. Midland Carbon Co.*, 254 U. S. 300; and *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61.

The standard of "unreasonable waste" is firmly imbedded in the law of waters of California, where the owners of land over percolating waters or riparian to a stream are recognized as having correlative rights to the use, but not to "unreasonable waste", from the common source of supply. This rule was applied by analogy as sufficient to enable the appellee Superior Court sitting in equity to determine in each case the extent of the "unreasonable waste" of natural gas fixed by statute as the standard of the prohibited waste. The opinion of the California District Court of Appeal [R. pp. 355 *et seq.*], and the opinions of the Supreme Court of California are largely devoted to these questions [Supp. pp. 33-36 and 50, Appendices B and C].

IV.

ARGUMENT.

Summary of the Argument.

POINT A.

Prohibition is Not Appellants' Remedy.

The appellee court of equity has jurisdiction by preliminary injunction to preserve the subject matter of the action until a trial may be had and the issues of fact and law determined. Jurisdiction in equity includes the power to determine wrongly as well as the power to determine rightly. Error is to be corrected by appeal and not by writ of prohibition.

POINT B.

The Statute Provides an Adequate Remedy in a Court of Equity.

Every requirement of due process of law under the Constitution of the United States is met by a trial on the merits in a court of general jurisdiction with the right of appeal to the Supreme Court of the state. This the California statutes provide.

POINT C.

The Right of the State to Prevent Waste in the Production of Gas and Oil is Established by Decisions in This Court.

The right of a state to prevent the waste of natural gas by legislation enacted in the exercise of the police power has been established by decisions in this court. The opinions of this court in these cases have become a part of the jurisprudence of all the oil and gas producing states with the exception of Montana.

POINT D.

The Construction of the Statutes of California is for the Courts of Last Resort of That State.

The definition of property rights in land is a matter of local law. The statute does not impair the obligation of appellants' lease contracts, as the leases contained the implied covenant that the lessees shall use the property lawfully.

POINT E.

Unreasonable Waste is a Question of Fact Properly Left to the Trial Court and is a Sufficient Standard to Guide the Judicial Judgment of That Court.

The California statute as construed by its courts of last resort contains as clear a definition of the prohibited unreasonable waste of natural gas as the nature of the

subject matter will permit. When the oil and gas operator is told by the statute the "release or escape of natural gas into the air shall be *prima facie* evidence of unreasonable waste" he is put on notice that when he permits any natural gas to escape into the air he must justify at least by the production of some evidence tending to show that the release or escape of the natural gas by him was reasonable under the circumstances. It is not necessary that this provision of the statute change the burden of proof in order to bring this appeal within the rule of *Bevins v. State of Iowa,* No. 574, October Term, 1930. Opinion in this court February 2, 1931, not yet officially reported.

POINT F.

There is No Substantial Federal Question Involved in the Appeal.

Quong Ham Wah Co. v. Industrial Accident Com., 255 U. S. 445, 448;

Oxford Oil Co. v. Atl. Oil Prod. Co., 277 U. S. 585;

Marrs v. City of Oxford, 280 U. S. 573;

Bevins v. State of Iowa, No. 574, October Term, 1930. Opinion by this court February 2, 1931.

POINT A.

Prohibition is Not Appellants' Remedy.

The appellee Superior Court is a court of general equity jurisdiction under the Constitution of the state of California (Cal. Const., Sec. 5, Art. VI; *Tulare Irr. Dist. v. Superior Court,* 197 Cal. 649, 660).

The injunction sought to be vacated by this appeal is a preliminary injunction subject to modification on application to the appellee court, and was granted to maintain the subject matter of the action to respond to the final judgment. Such a preliminary injunction is appealable under the laws of the state of California to the Supreme Court of that state (Subdiv. 2, Sec. 963, C. C. P.; Stats. Cal. 1923, p. 750; Sec. 4, Art. VI, Cal. Const.).

Upon sufficient cause being shown, the Supreme Court of the state will grant a writ of supersedeas restraining the enforcement of the preliminary injunction in the Superior Court until the appeal can be heard [*People v. Associated Oil Co., et al.*, decided Dec. 3, 1930, Supp. p. 24, Appendix B].

A preliminary injunction does not amount to an adjudication of the ultimate rights in controversy, but is granted to preserve the *status quo* pending the outcome of the case on its merits, so that the subject matter may respond to the final judgment (*Kendall v. Foulks,* 180 Cal. 171).

As said by the Supreme Court of California in denying another writ of prohibition in *Truck Owners etc. Inc. v. Superior Court,* 194 Cal. 146, 155:

> "We are not here concerned with the nature of the right which the said plaintiff is seeking to enforce. If the Superior Court has jurisdiction to entertain the action it has the power to define the right sought to be protected. Nor are we here concerned with the correctness of the judgment of the Superior Court. The jurisdiction of the court is the power to hear and determine. It is not contingent upon the regularity of its exercise nor upon the correctness of the decision (*Lange v. Superior Court,* 11 Cal. App. 1

(103 Pac. 908)). If the judgment of the Superior Court be incorrect it may be reversed on appeal, but not on prohibition (Sutter-Butte Canal Co. v. Superior Court, 183 Cal. 324 (191 Pac. 529))."

This court has laid down the same rules and for the same reasons. See

Swift & Co. v. United States, 276 U. S. 311; and
Mt. Vernon-Woodberry etc. Co. v. Alabama I. P. Co., 240 U. S. 30.

Where the state court of final authority has denied a writ of prohibition and thereby sustained the jurisdiction of the trial court to hear and determine the validity of the state statute it is a rule of law in this court that the denial of the writ of prohibition will be sustained (*Missouri v. Taylor,* 266 U. S. 200; *Mt. Vernon-Woodberry etc. Co. v. Alabama I. P. Co.,* 240 U. S. 30).

"Another answer to this argument of petitioners is that having determined that the court has the jurisdiction to determine what is an unreasonable waste, we cannot interfere by the writ of prohibition to deprive its judgment of effect. And we here direct attention to the determination of the respondent court that 'there appears to be an unreasonable waste of natural gas in the Santa Fe Oil Field', and 'that the evidence available * * * shows that the unreasonable waste of natural gas in said field may be substantially reduced and that the equities of all parties may be fairly conserved by a preliminary injunction which will limit the waste of gas by restricting the production thereof to a quantity reasonably in excess of the present outlets for beneficial use above ground, etc., etc.' It does not appear from the facts presented to us that insofar as the particular case before us is concerned the court exceeded its jurisdiction in finding as we have already quoted." [Opinion on Order Appealed From, R. pp. 362-363.]

POINT B.

The Statute Provides an Adequate Remedy in a Court of Equity.

This court requires that the aggrieved party must have his day in a court of general jurisdiction to question the validity of the state statute under the Federal Constitution (*Lehigh Valley R. Co. v. Board of Public Utility Comrs.*, 278 U. S. 34, 38).

A hearing in the appellee Superior Court, a court of general jurisdiction with equity powers, meets every requirement of the Federal Constitution (*Ohio ex rel. Bryant v. Akron Metrop. Pk. Dist.*, 281 U. S. 74, 80; *Coffin Bros. & Co. v. Bennett*, 277 U. S. 29, 31).

This right to a judicial hearing having been secured to appellants, a writ of prohibition could not be issued to restrain the appellee Superior Court from exercising its jurisdiction in equity pending a trial of the action, "without disregarding the plain statutory provisions providing means for reviewing the action of the court which is complained of, and which, if availed of, would afford complete and adequate remedy" (*Ex parte Oklahoma*, 220 U. S. 198).

POINT C.

The Right of the State to Prevent Waste in the Production of Gas and Oil is Established by Decisions in This Court.

In *Bacon v. Walker*, 204 U. S. 313, 315, *et seq.*, Mr. Justice McKenna, speaking for this court, said:

> "The laws and policy of a state may be framed and shaped to suit its conditions of climate and soil.

> Illustrations of this power are afforded by recent decisions of this court. In *Clark v. Nash,* 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, a use of property was declared to be public which, independent of the conditions existing in the state, might otherwise have been considered as a private. So, also, in *Strickely v. Highland Boy Gold Min. Co.,* 200 U. S. 527, 50 L. Ed. 581, 26 Sup. Ct. Rep. 301. In the first case there was a recognition of the power of the state to deal with and accommodate its laws to the conditions of an arid country and the necessity of irrigation to its development. * * * Of pertinent significance is the case of *Ohio Oil Co. v. Indiana,* 177 U. S. 190, 44 L. Ed. 729, 20 Sup. Ct. Rep. 576. There a statute of the state of Indiana was attacked, which regulated the sinking, maintenance, use, and operation of natural gas and oil wells. *The object of the statute was to prevent the waste of gas.* The defendants in the action asserted against the statute and ownership of the soil and the familiar principle that such ownership carried with it the right to the minerals beneath and the consequent privilege of mining to extract them. The principle was conceded, but it was declared inapplicable, as ignoring the peculiar character of the substances—oil and gas—with which the statute was concerned."

These repeated decisions negative any substantial Federal question (*Ohio ex rel. Bryant v. Akron Metrop. Pk. Dist.,* 281 U. S. 74, 79).

In the opinion of the District Court of Appeal of California, from which this appeal is taken, it is said:

> "When the rights of one impinge upon the rights of others the state may interpose for the purpose of adjusting and regulating the enjoyment of those rights. This is, in a large part at least, the foundation of all the authorities which support the power of the state to regulate the production of oil and gas. In Ohio Oil Co. v. Indiana, 177 U. S. 190 (44 L. Ed.

729), it is said: 'No one owner of the surface of the earth, within the area beneath which the gas and oil move can exercise his right to extract from the common reservoir, in which the supply is held, without to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights. The waste by one owner, caused by a reckless enjoyment of his right of striking the reservoir, at once, therefore, operates upon the other surface owners,' and '* * * (T)he surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. *But there is a coequal right in them all to take from a common source of supply the two substances which in the nature of things are united, though separate.* It follows from the essence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right to the detriment of the others, *or by waste by one or more to the annihilation of the rights of the remainder.* Hence it is that the legislative power, from the peculiar nature of the right and objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them of their privilege to reduce to possession, and to reach the like end by preventing waste.'"

Twenty years after this court decided the case of *Ohio Oil Co. v. Indiana, supra,* and in the last opinion of this court dealing directly with a statute of a state passed to prevent the waste of natural gas, this court in sustaining the statute of Wyoming, in *Walls v. Midland Carbon Co.,* 254 U. S. 300, said:

"And in this consideration it is more important to consider not for what a particular owner uses the gas, but the proportion of his use to that of others; or it may be the prevention of use by others; (p. 319) * * *

"The power is exerted to prohibit an extravagant or wasteful or disproportionate use of the natural gas of the state. * * * It is for the state to determine not only if any conservation be necessary, but the degree of it; and certainly the companies cannot complain if the state has not exerted its full power. (p. 323) * * *

"And there is great disproportion between the gas and the product, and necessarily **there was presented to the judgment and policy of the state a comparison of utilities which involved as well the preservation of the natural resources of the state,** and the equal participation in them by the people of the state. And the duration of this utility was for the consideration of the state, and we do not think that the state was required by the Constitution of the United States to stand idly by while these resources were disproportionately used, **or used in such way that tended to their depletion, having no power of interference."** (p. 324.)

The opinions of this Court in these cases have become a part of the jurisprudence of all the oil and gas producing states with the exception of Montana, so that the Supreme Court of the state of California in sustaining the validity of the Act of that state here under discussion was able, in *People v. Associated Oil Co., supra,* [Supp. p. 29], to say:

"The generally accepted view therefore is that the property right of the owner or lessee of land in and to the gas and oil beneath the surface is not an absolute one. Such substances, because of their peculiarity in the natural state, partake more of the nature of common property, title to which becomes

absolute when they are captured and reduced to possession. Because of their peculiar nature the public has a definite interest in their preservation from waste and destruction. This is true because of their character as natural resources and also because the public interest has attached by virtue of positive statutory law or by court judgment independent of statute. In seven states of the Union legislation making unlawful the unreasonable waste of natural gas has been upheld: Indiana: Indiana v. Ohio Oil & Gas Co., 150 Ind. 21, 47 L. R. A. 627; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. Ed. 729. Kentucky: Commonwealth v. Trent, 117 Ky. 34, 4 Ann. Cas. 209. Wyoming: Walls v. Midland Carbon Co., 254 U. S. 300, 65 L. Ed. 276. Oklahoma: Quinton Relief O. & G. Co. v. Corp. Com., 101 Okla. 164, 224 Pac. 156. Louisiana: State v. Carson Carbon Co., 162 La. 781, 111 So. 162. Texas: Oxford Oil Co. v. Atlantic Oil P. Co., 22 Fed. (2d) 597; certiorari denied United States Supreme Court, 72 L. Ed. 1000; R. R. Com. of Texas v. Bass, 10 S. W. (2d) 586; Magnolia Petroleum Co. v. Stroud, 3 S. W. (2nd) 462. Kansas: State v. Lebow, 280 Pac. 773, 775; Marrs v. City of Oxford, 32 Fed. (2d) 134. Rehearing denied Circuit Court of Appeals, May 17, 1929. Certiorari denied United States Supreme Court, October 21, 1929."

POINT D.

The Construction of the Statutes of California Is for the Courts of Last Resort of That State.

The definition of property rights in land is a matter of local law. This rule was definitely applied by this Court to natural deposits of oil and gas when, in *Ohio Oil Co. v. Indiana,* 177 U. S. 190, 211-212, you said:

"In view of the fact that regulations of natural deposits of oil and gas and the right of the owner to take them as an incident of title in fee to the

> surface of the earth, as said by the Supreme Court of Indiana, **is ultimately but a regulation of real property, and they must hence be treated as relating to the preservation and protection of rights of an essentially local character.** Considering this fact and the peculiar situation of the substances, as well as the character of the rights of the surface owners, we cannot say that the statute amounts to a taking of private property, when it is but a regulation by the state of Indiana of a subject which especially comes within its lawful authority."

Later, in *Walls v. Midland Carbon Co., supra,* where the action originated in the Federal courts and there was no decision in the courts of the state of Wyoming, this Court adopted and applied the same rule as a proper exercise of the police power of the state.

It is the well settled rule in this Court that both the meaning of the statutes of a state and the rules of law of the state defining property in land within the state are peculiarly questions of local law to be ascertained and established by the state courts (*Edward Hines Yellow Pine Trustees v. Martin,* 268 U. S. 458; *Lindsley v. Natural Carbonic Gas Co.,* 220 U. S. 61; *Sauer v. New York,* 206 U. S. 535; *Fox River Paper Co. v. Railroad Com. of Wis.,* 274 U. S. 651).

The rule applies to what is included under the term "land" within Mexican grants confirmed under the treaty of Guadalupe Hidalgo and patents under the Act of Congress of March 3, 1851 (*Los Angeles Farming & M. Co. v. Los Angeles,* 217 U. S. 217, 233).

The Oil and Gas Conservation Act does not impair the obligation of appellants' lease contracts. Under the law of California, as stated by the Supreme Court of that

state in *Ambassador Petroleum Co. v. Superior Court*, 208 Cal. 667, 674:

> "The leases contain the implied covenant that the lessees shall use the property lawfully. (*United States v. Gaffney, supra.*) The fact that the royalties of the lessors may be cut down by reason of regulations imposed upon the lessees would not result in any legal prejudice to their rights. If it be assumed that any temporary injunction or final judgment in the pending action may curtail production, such curtailment will be to the extent only that the operations of the petitioners constitute unlawful operations and a statutory nuisance."

What incidents attach to instruments of conveyance of interests in land is a matter of state law in respect to which the determination of the state courts is conclusive (*Mount St. Mary's Cemetery Assn. v. Mullins*, 248 U. S. 501, 504).

Decisions of a state court in matters of local law are not made Federal questions by the Fourteenth Amendment to the Constitution so as to be subject to revision in this Court (*Patterson v. Colorado*, 205 U. S. 454; *Tracy v. Ginzberg*, 205 U. S. 170; *O'Neil v. Northern Colorado Irr. Co.*, 242 U. S. 20).

Questions determined by "repeated decisions of this Court" sustaining the power of a state cannot be considered as presenting "any substantial Federal question" (*Ohio ex rel. Bryant v. Akron Metrop. Pk. Dist.*, 281 U. S. 74, 79).

POINT E.

Unreasonable Waste is a Question of Fact Properly Left to the Trial Court and is a Sufficient Standard to Guide the Judicial Judgment of That Court.

Mr. Justice Harlan in delivering the opinion of this Court sustaining the validity of a Massachusetts statute

requiring the vaccination of all the inhabitants of that state took occasion to say in *Jacobson v. Massachusetts*, 197 U. S. 11, 39:

> "'All laws,' this court has said, 'should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.' *United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278; *Lau Ow Bew v. United States*, 144 U. S. 47, 58, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517. Until otherwise informed by the highest court of Massachusetts, we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination."

Consonant with this rule, the District Court of Appeal of California, in sustaining the jurisdiction of appellee court (*Bandini v. Superior Court* [R. p. 357]), said:

> "We therefore turn to the second angle of our problem: Is the statute void for uncertainty and the failure of the legislature to define a standard of conduct? The objection thus urged against the enactment arises from the use of the word 'unreasonable'. Were it not for the argument that it is not waste to permit the use of the gas to lift the oil to the surface it would be obvious that without the qualifying word the enactment could not be subjected to attack on the ground of uncertainty. As we have heretofore observed, the Indiana statutes prohibited all waste, and the United States Supreme Court concluded it to be a proper exercise of the legislative authority despite the argument that the owners of the surface were entitled to make use of

its force to raise the oil from beneath the ground. Undoubtedly the legislature had in mind the Indiana statute and its construction, as well as others from other oil producing states. It would seem to logically follow that they made use of the word *unreasonable* for the very purpose of providing that the operators of a well might utilize a reasonable proportion of gas for the purpose of lifting the oil to the surface. This thought coincides with that indicated by the language we have already quoted to the effect that it shall be held to be an unreasonable waste of gas for one to produce gas in excess of 'a reasonable proportion to the amount of oil produced', when such gas is not conveniently necessary for other than lifting purposes. When viewed in this light we think the word unreasonable is not so uncertain as to render the enactment void and inoperative. In fact our courts have frequently applied the rule of reasonable use between riparian owners where similar correlative rights are involved. We have already cited the case of Eckel v. Springfield Tunnel etc. Co., and *Ex parte* Elam, and to these we may add the following: Irrigation Dist. v. Mt. Shasta P. Corp., 202 Cal. 56 (259 Pac. 444); Turner v. The James Canal Co., 155 Cal. 82 (99 Pac. 520). In the latter of these two cases the words are so pertinent that they should be quoted. They are: 'Out of regard to the equal rights of others whose lands may abut upon the same water the law has declared, as will hereafter be more fully shown, that the use of the water for irrigation, so far as it affects the rights of others similarly situated, *must be reasonable,* and must be confined to a reasonable share thereof.'

"These authorities set at rest the contention that the enactment is uncertain as well as the incidental assertion that the legislature has by the language of the act and its failure to define a standard of conduct with greater rigidity, attempted to confer upon the court a legislative function. From them, as well as those cases such as Standard Oil Co. v. U. S., 221 U. S. 1 (55 L. Ed. 619), wherein the court an-

> nounced and adopted the 'rule of reason', holding that it was only those unreasonable restraints of trade which were intended to be curbed by the Sherman Anti-trust Act, we find that the courts have for a considerable period of time been accustomed in *circumstances such as are concerned in the present enactment to apply the standard and guide of reason for the adjustment of those rights the unrestricted exercise of which would injuriously affect the rights of others.*"

The standard of "unreasonable waste" of natural gas in the California statutes, as construed by the courts of that state, is the "rule of reason" declared by this Court in *Dr. Miles Med. Co. v. John D. Park & Sons Co.,* 220 U. S. 373, 405; and *Standard Oil Co. of N. J. v. U. S.,* 221 U. S. 1, 63-64. In *Ex parte Daniels,* 183 Cal. 636, 643, where the Legislature had written the word "reasonable" into the statute as the standard, the Supreme Court of the state of California, referring to the opinion last cited, said:

> "It is scarcely to be assumed that this court would read into a statute by construction a provision which had it been included therein at the time of its enactment would have rendered the statute void and unconstitutional because of the uncertainty involved in the use of the very term read into it by the court, namely, reason."

The opinion of the District Court of Appeal from which we have quoted at such length, *supra,* sought no new untried definition of unreasonable waste, but found the definition by analogy in the established jurisprudence of the state in respect to the law of waters. The analogies in the rules applicable to these two natural resources in which landowners possess correlative rights which must

be determined by proportions of use rather than by quantity runs through all the decisions having to do with the right to the use of water by landowners overlying the common pool of percolating water, or having riparian rights on the same stream, or having the right to produce oil and gas since the decision of this Court in *Ohio Oil Co. v. Indiana, supra.*

The law on the subject of waste (common law waste) must be applied with reasonable regard to the circumstances, and, as stated in an early California case, "the question *waste or no waste* is left to the courts." (*McCord v. Oakland Q. M. Co.*, 64 Cal. 134, 141.)

Appellants were not left by the statute without clear notice of the line where they assumed the risk of unlawful waste, for, as stated by the Supreme Court of California [*People v. Associated Oil Co., supra,* Supp. p. 38]:

> "Objection is made to the provision of section 8b of the act that 'the blowing, release or escape of natural gas into the air shall be *prima facie* evidence of unreasonable waste', as inconsistent with other provisions of the act which it is claimed authorize some waste of gas in the production of oil. The state has the power generally 'to prescribe the evidence which shall be received and the effect which shall be given to it in her courts, and may exert this power by providing that proof of a particular fact, or of several taken collectively, shall be *prima facie* evidence of another fact'. (Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61.) In prescribing that any waste shall be *prima facie* evidence of unreasonable waste, the state has cast upon the party found to be wasting gas the burden of justifying the same. A statute which casts the burden of proof upon the defendant in a criminal action upon the proof of certain facts for whose existence he is responsible, has been upheld. (People v. Osaki, 79

Cal. Dec. 244.) As applied to a civil action a statute imposing the burden of proof is freed from the objections incident to the rules inherent in a criminal prosecution and cannot be avoided for any reason suggested by the petitioner or otherwise apparent.

"It is contended that the real purpose of the statute is to curtail the production of oil so as to regulate and stabilize the market price thereof. We cannot agree with this contention. Obviously the enactment is an effort on the part of the legislature to conserve for present and future needs great natural resources in which the people of the state are interested."

Appellants were, therefore, on notice as soon as they wasted any gas to the air that they must justify such action as reasonable. This brought them definitely within the line where they carried the risk (*United States v. Wurzbach*, 280 U. S. 396, 399; *United States v. Alford*, 274 U. S. 264, and authorities there cited).

For the purpose of charging an operator of an oil and gas well with notice that he is within the field wherein, he acts at his peril in releasing gas to the air, and so within the same class with those having specific intent to violate the law, it is sufficient if the statutory presumption accomplishes no more than a shifting of the burden of going forward with the evidence (*Hill v. Smith*, 260 U. S. 592, 594). The state statute may and in the present case does give a larger effect than this by declaring that positive evidence of such facts shall be *prima facie* evidence of other facts properly but not necessarily to be inferred from the proven facts (see cases quoted above in *People v. Associated Oil Co., supra*).

Appellants, therefore, knew when they released to the air approximately fifty per cent of the natural gas pro-

duced with their oil, amounting to 26,000,000 cubic feet of gas a day, or the equivalent in energy of 1300 tons of good coal, each average day, that they had passed beyond the line where they or any judicial authority could assume they were without intent to unreasonably waste gas within the language of the statute.

POINT F.

There is No Substantial Federal Question Involved in This Appeal.

As this court said in another case:

> "If the meaning affixed to the statute by the court below be accepted, every basis for such contended discrimination disappears. It follows that the argument but accentuates the frivolous character of the Federal question relied upon." (*Quong Ham Wah Co. v. Industrial Accident Com.*, 255 U. S. 445, 448. See also *Pierce Oil Corp. v. Hopkins*, 264 U. S. 137, 139.)

More recently this Court has dismissed an appeal from the Supreme Court of the state of Iowa where the same question of certainty in the statute was raised, saying in *Bevins v. State of Iowa*, No. 574, decided February 2, 1931, 75 L. Ed. (Adv. Sheets) 287:

> "Per Curiam: The appeal herein is dismissed, for the want of a substantial Federal question.
>
> "(1) Nash v. United States, 229 U. S. 373, 57 L. Ed. 1232, 33 S. Ct. 780; Omaechevarria v. Idaho, 246 U. S. 343, 62 L. Ed. 763, 38 S. Ct. 323, Hygrade Provision Co. v. Sherman, 266 U. S. 497, 501, 69 L. Ed. 402, 407, 45 S. Ct. 141.
>
> "(2) Huntington v. Worthen, 120 U. S. 97, 102, 30 L. Ed. 588, 590, 7 S. Ct. 469."

Where statutes of Kansas and Texas directed to the same purpose were sustained by the Circuit Court of Appeals a writ of certiorari was denied in this Court. (*Marrs v. City of Oxford*, 280 U. S. 573; *Oxford Oil Co. v. Atlantic Oil Prod. Co.*, 277 U. S. 585.)

The writ of prohibition was properly denied (*Mt. Vernon-Woodberry etc. Co. v. Alabama I. P. Co.*, 240 U. S. 30).

The public policy of the state of California in the regulation of a great natural resource is suspended by a supersedeas pending the decision of the appeal in this Court. [R. p. 694.] A speedy conclusion is accordingly urged.

It is respectfully submitted that the appeal should be dismissed or the judgment below affirmed.

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